Supreme Court, U.S.
FILED

031150 FEB 9 2004

No. 03-

IN THE

Supreme Court of the United States

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,

Petitioners,

v.

AMERICAN LAWYER MEDIA, INC., NEW YORK LAW PUBLISHING COMPANY, LAW.COM, INC., U.S. EQUITY PARTNERS, L.P., JAMES J. McDONALD JR., ESQ., CHARLES A. CONINE, STEPHEN C. JACOBS, ESQ., THE NATIONAL LAW JOURNAL, AMERICAN LAWYER MEDIA HOLDINGS, INC., and FISHER & PHILIPS, L.L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, FIRST APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether where constitutional issues abound, successive or serial libels should not be excused, because communication of similar but not the same falsities in different contexts and genres of publication can lead to material confusions in case law and outcomes even if that is what tortfeasors by their actions intend?

2. Whether this court should let stand a state court decision which up-ends well-settled federal case law on physical disabilities and deems it to be decisional law on mental disabilities, and declares but does not explain the constitutional and constitutionally-based grounds upon which it purportedly does so?

3. Whether under constitutions federal and state — with life, liberty, and property interests protected thereunder — New York's Civil Right's Statute § 74 conferring immunities against suit in libel against fair and true reports of judicial proceedings, is so impermissibly vague in the concepts of truth, or so sweepingly broad in its potential reach, or otherwise defective on its face or as applied here due to its lack of standards so as to fail to pass muster under either the Federal or State Constitutions?

4. Whether a Decision that the physical pain of Trigeminal

Neuralgia is a mental disorder so confounds the problems of individuals with disabilities, and in derisive contexts, so as to offend the federal statutes based on non-discrimination?

5. Whether the courts in granting New York Civil Rights § 74 and federal First Amendment protection to writers and publishers who repackage a duly filed Rehabilitation Act Suit based on physical disabilities of severe pain as if an American with Disabilities Act Suit based on real or fabricated mental disorders:

   (a) violate the individual's equal right to free speech and right to petition under the Constitution;

   (b) act beyond their judicial powers in their deciding medical matters;

   (c) spotlight the insubstantial and perhaps itself unconstitutionally vague and broad nature of the state statute affording a defense of privilege that can block access to juries on the basis of such inaccuracies being deemed by the court itself not serious;

   (d) Impermissibly look aside from *O'Connor* and progeny decided in their own court system, under a jury should have been afforded?

6. Whether as to equal protection and due process, the courts rulings that interchange physical and mental disabilities to grant defendants relief in pre-answer, pre-discovery stature, and by so doing preempt without leave to replead, a disability-based libel suit, creating a procedurally impoverished *underclass* of plaintiffs with disabilities — and, if so, is this a prohibited form of discrimination on the basis of sub-minimal scrutiny?

7. Whether 'revolving' door or 'ricochet' decisions whereby different courts quote each other as authority for holdings but as yet no court ever addresses all issues plead in complaints let alone or resolves them, or looks to total texts complained of, validly provide a valid basis for dismissals on preclusion grounds ?

8. Whether under tenets of equal protection and due process this case in potentially virulent Internet libel (cyberlibel) was wrongly excised from the courts without registration to governing substantive law, but rather through impermissibly unreasoned and delphic declarations?

9. Whether the constitutional scope and tenor of the courts' holdings in this case offend civil practice principles and law in forcing closure on high grounds but allowing the defendants to skirt answering and cooperate in discovery to develop a record for the jury to weigh?

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PETITION FOR A WRIT OF CERTIORI

Petitioners Linda D. Misek-Falkoff and Adin Falkoff respectfully petition for a writ of certiorari for this court to review the judgments of the Supreme Court Appellate Division, First Department, New York, and the Supreme Court, New York County IAS Part 19, First Department, New York in this case, and to reverse summarily or remand for further proceedings in the subject courts or provide for briefing in this court or otherwise provide relief to preserve for Petitioners, and all citizens and persons with disabilities included, the rights of free speech and free expression and the right to petition the government for grievances in our own voices and rest on the outcomes once settled, and to enjoy the protections of substantive and procedural due process and the protections of anti-discrimination law and social values on an equal basis with others.

With especial emphasis, we respectfully ask this Court to provide that settled case law concerning individuals with disabilities, strenuous as they are in themselves to endure, not be with courts' approvals knowingly misreported and miscast, as if this does not matter. This is especially important in today's dawning of swift and often pragmatically untraceable electronic transmission of "portable," here medical, data on computer systems such as, at present, the Internet, and thereby affronting the universal and reasonable call for accuracy in such recordations.

ORDERS AND OPINIONS BELOW

The Decision and Order of the Supreme Court, Appellate Division, First Department, New York, (per Williams, P.J., Mazzarelli, Buckley, Friedman and Marlowe,

JJ., December 31, 2002) is cited at 300 A.D.2d 315, 752 N.Y.S.2d 647 and also at 31 Media L. Rep. 1447, 2002 N.Y. Slip Op. 11087. It appears here at Pet. App. B.

The Order of the Supreme Court, New York County, IAS Part 19, First Department, New York (per Lehner, J., September 24, 2001) is unpublished. It appears here at Pet. App. C.

The Denial of Leave to Appeal by the Supreme Court, Appellate Division, First Department, New York (April 8, 2003) is unpublished and appears here at Pet. App. D1.

The Denial of Leave to Appeal by the Court of Appeals of New York (July 2, 2003) is cited at 100 N.Y.2d 508, 796 N.E.2d 477, 764 N.Y.S.2d 385 (Table) and appears here at Pet. App. D2; the Denial of Reargument by the Court of Appeals of New York (September 11, 2003) is cited at 100 N.Y.2d 616, 799 N.E.2d 621, 767 N.Y.S.2d 398 (Table) and appears at Pet. App. D3.

The Honorable Justice Ruth Bader Ginsburg appreciated allowance of extension to file the present petition appears at Pet. App. E.

STATEMENT OF JURISDICTION

The New York State Court of Appeals denied Leave to Appeal July 2, 2003 and denied Reargument September 11, 2003.

By Order of December 1, 2003, the Honorable Justice Ruth Bader Ginsburg extended the time to file this Petition to February 8, 2004.

This Court has jurisdiction under 28 U.S.C. 1257(a).

PROVISIONS OF LAW

[At App Pet A.]

HEADNOTES:

"A false accusation of insanity, mental imbalance, or mental disease, is libelous per se under New York law."[1]

"States undeniably have an interest in affording individuals some measure of protection from unwarranted defamatory attacks. Libel actions serve that end, not only by assuring a forum in which reputations can be publicly vindicated and dignitary injuries compensated, but also by creating incentives for the press to exercise considered judgment before publishing material that compromises personal integrity . . . The law of libel seeks to protect various individual interests against injury resulting from false and defamatory communication. It runs squarely into the right to freedom of expression".[2]

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[1] *Goldwater v. Ginzburg*, 414 F.2d 324, 338 (2d Cir. 1969). And see Norwick, Kenneth, one of Defendant-Respondents' attorneys, who in The Rights of Authors, Artists, and other Creative People**Error! Bookmark not defined.** describes in this ACLU Book "Red Flag" 'words and expressions' ... that may lead to a libel lawsuit if not carefully handled by writers: including "mental disease." or "Any words or expressions imputing a "loathsome disease ... crime .. lying ... unprofessional ... unsound mind."

[2] *Celle v. Filipino Reporter Enterprises*, 209 F.3d 163, 171 (2d Cir. 2000) quoting *Herbert v. Lando*, 441 U.S. 153, 203 (1979).

INTRODUCTION

A. Petitioner's documented severe physical pain of Trigeminal Neuralgia (Tic Douloreux and advanced forms); the authenticating federal Rehabilitation Act action3 which Respondents call a mental case and an invalid one under the ADA; other proof of defamation and derision.

This case and this Petition for Certiorari address how far the media can wander from the truth and yet be awarded privilege from suit in libel by special interest statutes and rulings said to be grounded in the Federal Constitution's First Amendment and the state Constitution's reflection of federal law.

In 1999 and on the Internet Respondents launched a prior print now web-based article: "Mental Illness Won't Excuse Bad Job Performance: Workers with Mental Disorders Covered by the ADA Must Still Perform Key Functions of a Job." Although knowing Petitioner has a physical pain condition which is serious and extreme, and never brought an ADA suit at all, Respondents without mention of physical conditions at all ostensibly cite to a case that in their report reflects unworthy filings under The Americans with Disabilities Act.

The N.Y. Appellate Division has held for defendant respondents in the following manner as shall be discussed below in particulars:

> in fact, the IBM Action says Misek-Falkoff sued for discrimination based on a "neurological disorder" (854 F.Supp. at 226). This inaccuracy is not serious enough to remove defendants' reportage from the protection of

Civil Rights Law § 74. [*Misek-Falkoff et al v American Lawyer Media et. al*, 300 A.D.2d 315, 752 N.Y.S.2d 647; 31 Media L. Rep. 1447, 2002 N.Y. Slip Op. 11087].

On the surface, this statute, New York Civil Rights Law § 74, provides for access to juries where false and misleading reports of judicial proceedings are published.

And yet, citing Civil Rights Law § 74, in this context, to grant privilege to media Respondents here, the Appellate Division has demonstrated the slipperiness of that statute by declaring that under its provisions chronic and severe pain of Trigeminal Neuralgia – and presumably other types of disabling or potentially disabling physical pain – are close enough to being mental disorders to disallow a jury deciding how serious an inaccuracy it is to report a federal case claim based on physical pain and brought under an earlier federal non-discrimination statute (The Rehabilitation Act[4] which lacked certain provisions for mutual communications and interactive decision making), as if one based on a claim of mental disability brought under a later and more developed one (The ADA, which introduced more requirements of good communications and interactive decision making). .

If there is doubt that Trigeminal Neuralgia is recognized by the courts as an extremely painful physical malady, such compilations of case citations as here provided in Appendix F may be of service. Additionally, McKinney's neutral and objective abstractors, aside from not referencing the name of the co-plaintiff, apparently had no trouble understanding the matter when they included Petitioner in their statutory annotations concerning the physical disorder which Respondents mischaracterize as a mental one and a self-proclaimed mental one:

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[4] *Misek-Falkoff & Falkoff v. IBM*, 854 F.Supp. 215, (S.D.N.Y)., filed 1989 decided 1994.

NEW YORK CIVIL RIGHTS §40-c Discrimination
5. Physical disability

Misek-Falkoff v. International Business Machines Corp. 854 F.Supp. 215.

NEW YORK EXECUTIVE LAW §296 Human Rights
104. Physical disability, Generally, Employment.

Misek-Falkoff v. International Business Machines Corp. 854 F.Supp. 215.

The Petitioners and former employer have long resolved their differences arising in the 1970's and 80's and have enjoyed a cordial and productive relationship up to where on the Internet their earlier misunderstandings unsettlingly erupted in the context of unworthy ADA filings; an anathema and anachronism which the reader/viewer of mis-reports would have not way to detect.

This is unwarranted, untenable, prohibited inclusion of the worst sort, stereotyping in bad faith, and treating persons with disabilities as if they are all the same and not individuals..

This petition for certiorari thus follows upon a several years quest thought the New York courts to simply have a federal Rehabilitation Act action reported correctly and to try and quell repetitions which are injurious to the Petitioners but the entire class of persons with disabilities as well in undermining individuality and disrespecting diversity.

In the year 1994, expressly deciding a physical disability Rehabilittion Act case filed in 1989, the late in her name), the late honorable Judge the late Honorable Judge Vincent L. Broderick described the principal plaintiff's severe physical pain of Trigeminal Neuralgia and the problems handling attacks at unpredictable times in the

workplace.[5] Similar accounts of others' difficulty maintaining even keel and a steady sense of self with shocks and blows of head and face pain abound in the literature, and exchanges, including on the Internet,[6] of many persons suffering facial nerve pain, migraines, and other medical conditions.

B. The gist and sting of false labels and libel of disabilities spread on the Internet.

Clearly by title claiming he is writing about the Americans with Disabilities Act suits and not just employment suits in general, and on the Internet where foreseeably and even desirably by authors, "Search Engines" will retrieve and frame keywords in close catenations such as: Petitioner's name, "excuse," "misconduct" [not] "disease," and "mental illness." McDonald of his own free choice chose to specifically name actual persons he says exploited the ADA and therefore these cases distracted from valid ADA claims by filing phony or unworthy mental disability claims relatively new and just being tested EEOC Psychiatric guidelines for accommodation. It is said to troubles McDonald and others that getting along is becoming a claimed major life activity. Others in the period chose to

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[5] In this petition, the first petitioner-plaintiff will in several places be designated as "Petitioner" in that suit concerns her disabilities being materially mischaracterized. This is intended as without prejudice to the co-petitioner's standing to bring suit presently, because his own prior co-plaintiff standing in a former suit is maligned in instant misrepresentations of a prior federal action.

[6] Petitioner Dr. Misek-Falkoff has been a member and moderator of internet and prior net discussion lists since the early 1960's and is well familiar with the suffering of many others from those pains as well as her own struggle with them.

use hypothetical to express their criticisms to McDonald those he names, and he names these petitioners, do not deserve protections of the ADA because they are not ill or disabled rather they just malfeasantly try to cover up misconduct by claiming a disability and benefit under the statute.

The courts without precedent or logic explained have so far have provided McDonald with First Amendment press defenses of fair comment and reporter's privileges under State Civil Rights Statute § 74, which statute now itself bears review.[8] The statute (Law Provided, *supra)* now seems to accommodate the disaccommodation of persons with disabilities, which aggrieves federal anti-discrimination law, and the remedies for plaintiffs abused by false reporting are not reachable as they sit in Clause the Second which de-immunizes abuse, if courts decide on fiat to look aside from abuse. This looking aside collides with New York's own Constitution, which in article I. 8 incorporates a reference to the Federal Constitution, and granting freedom of the press in so far as it does not falsify and impinge on individual liberties [9] stating as follows from the New York Constitution (*supra*):

> Every citizen may freely speak, write and publish his or her sentiments on all subjects, being

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[7] For example the firm of [elided] who averred in writing they would remove the false reference if it "turned out" Trigeminal Neuralgia is physical (and who may have tried but chasing cyberlibel is elusive); [elided], law firm of [elided], (with PLI Handbook series conversations as to corrections to correct now underway), and others readily seen on the "Web" with others in print or recordings no doubt quite extant.

[8] Another conundrum is The court's lack of comment on plaintiffs' submitted instances of injunctions against continuation of adjudicated falsities, other cases, to curtail spread on the Internet.

[9] Or, iintrude upon,, as Justice Brandeis wrote in the Harvard Law Review, the precious right of privacy, the right "to be let alone".

responsible for the abuse of that right. [Underlining supplied].

New York State Constitution 1 8. [Freedom of speech and press; criminal prosecutions for libel] (As amended Nov. 6, 2001, eff. Jan. 1, 2002.)

C. The problems of false reports of judicial proceedings regarded as true and undermining constitutional safeguards.

Notwithstanding prior and present rulings in the same Department which emphasizes elsewhere that inaccurate reports of judicial proceedings must go to a jury (infra), and out of keeping with the promises of balance as set forth in New York's own Constitution, and with precepts of balance in the First Amendment of the Constitution itself (to which the state appellate court refers), the courts here excuse the "inaccuracies" of large media defendants' false reports on the law by rewarding false stereotypes that all persons with disabilities are the same or interchangeable as to their conditions and their histories legal or otherwise

Petitioners respectfully submit there must be some mistake. Some misunderstanding, some flaw in 'translation.'

STATEMENT OF THE CASE.

A. Respondents' abandonment of remeditiating dialogue pre-suit.

When Plaintiff/Petitioners found that search-engines on the Internet falsely reported them as filing an unworthy ADA suit with falsified depictions of one describing herself as mentally disabled herself as mentally disabled, and with reference to EEOC Psychiatric Guidelines and actual ADA

cases, within apparent short space of publication and timely and personally notified the defendants that they needed to check their article against the actual case. They promised to, then apparently changed their minds [The Record.].[10]

B. The Complaint timely filed for court intervention.

The Complaint was timely filed when communications with Respondents suddenly ceased from their quarters. The Complaint pointing to particular words and passages as well as the overall web page article asserted defamation of character, invasion of privacy, interference with economic advantage, both negligent and intentional infliction of emotional distress, and loss of consortium on spousal grounds. The complaint associated these claims with particular patches of text, the overall sting of the message, and the online context which provided for a demonstrated rapid spread of misrepresentations.

> **The Complaint asserts that defendants defamed plaintiffs by, inter alia, casting Dr. Misek-Falkoff's severe physical pain disorder as a psychiatric disorder; communicating that her medical leave was instead terminal discharge from employment;**

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[10] Dr. Misek-Falkoff conveyed to Mr. Jacobs the lack of response from the Editor, and both Plaintiffs' concerns about what she knew to be a false and potentially quite damaging depiction of herself apparently coming from his company computer sites. ... Dr. Misek-Falkoff was clear and candid that she suffers from severe and, under acute stress, debilitating, residual pain of Trigeminal neuralgic origin, and that the spreading of false information about Trigeminal Neuralgia was both stressful on her health and could be mis-informationally damaging to many and therefore for several reasons quite hurtful and perilous for both herself and Mr. Falkoff, and that the prospect of these allegations spreading on the Internet was seriously weighing on both Plaintiffs as persons and as computer professionals . [Appellate Brief of Bergstein].

> **portraying plaintiffs as falsifying Misek-Falkoff's medical condition; impugning their professional competence and integrity; using their names to impugn ADA litigants; distorting their professional relationships and ruining her resume with defamatory online allegations about her competence and credibility. Plaintiffs further charged that defendants employed appellants' names and likenesses to promote their legal services and, in turn, chilled their future business opportunities. These torts intentionally and negligently caused appellants substantial emotional distress as well as the loss of consortium. [Bergstein appellate brief]**

And The Complaint sets forth further harms they suffered and are suffering and which still deserve consideration had not the first court held them time barred on in spite of filing within one year.[11]

C. The trial court rejection of New York traditional publishing law in dismissing the suit as untimely.

The trial level court refused to apply New York's Single Publication Rule and "*Rinaldi*[12]) republication

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[11] Because McDonald was to write again about the ADA and in different language with different connotations and tonalities and again include Petitioners while he was at present suit, defendants claimed the first action had to be precluded. This position collides with the fact that there are only a few types of claims appropriate for libel suits when one is defamed and of course the claims as such will yet again arise but on different transactions. This raises a serious question whether because one has sued in tort once one cannot again of offenses arise.

[12] *Rinaldi v. Viking Penguin*, 73 A.D.2d 43, 46 (1st Dept. 1980) aff'd; 52 N.Y.2d 422 (1981); and see the Record for Petitioners' submitted papers on the case line of *Firth* where early filings were beyond the one year statute but more recently within it, and new enterprises, new editions as

predicates setting a new time to file upon new enterprises; it time-barred the case on a motion to dismiss before discovery or requiring defendants to answer and refused to allow a repleading; each attempt to speak in the court at several appearances was blocked by the Defendants; only they were allowed to speak and only they received court notifications.

To petitioners' disappointment, the scheduled Oral argument where Petitioners were to speak to the law was cancelled right in Court as Defendants requested. However, Judge Lehner did not adopt defendant's morphing proffer that pain relates to brain (in their surmise) and brain to mind and therefore physical pain is a mental disorder. Still, inconsonant with both traditional and developing online (Internet) law, he accepted that that prior publication of related matter in print form precluded suit when it went on the internet. [See The Single Publication Rule explicated by Plaintiffs in Opposition to dismissal and Plaintiff's counsel's renditions on the same when he appeared for a while in the case. [The Record]. [13]

The trial court judgment on the pre-answer, pre-discovery CPLR § 3211 Motion to dismiss was not

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in *Rinaldi* did finally spring a year in which to file an action for online libel. The suit has gone up the full court ladder, at each rung finding emphasis that new editions bring new time to file.

Instantly, in what may be the first timely internet libel filing of record, the court has overlooked or denied the existence, proffer, and documentation of multiple republication predicates that ought to spring a year to file: new enterprise, new edition, new genre, new publicity new style that New York law holds predicates for springing a time for filing a case). Plaintiffs as computer scientists had long noticed items on line and filed well within one year compatible with New York Law, and the state of the law was and is that internet publication (see line of developments in *Firth V. State,* 98 N.Y.2d 365, 368, 775 N.E.2d 463, N.Y.S.2d 69 (N.Y. 2002); and more recent decisions confirming internet based libel actionable from first publication on the Net [The Record].

converted to one for (§ 3212) summary judgment as if the complaint had been answered and discovery taken place.

The appellate court decision that inaccuracies involved in swapping medical diagnoses are not serious enough for a jury. The Appellate Division first refers to Judge Brieant in a later filed federal suit filed when during the pendancy of the present action, in Spring of 2000 (Tenth Year Anniversary of the ADA) McDonald next (as far as is known without discovery) included Petitioner's in the article "Americans with Difficult Personalities Act" in Aspen Publisher's Employee Relations Law Journal.

On suit brought in the Southern District of New federal court, that court (per Brieant, J.) only held that libel would not hold respecting the issue of getting along, which in fact was part of the prior employment suit; he said nothing about mental disabilities or interchangeability of diagnoses in his first amendment holding. Judge Brieant , however, also made his ruling before Answer of discovery, the weight of which therefore might have drawn question.

The Appellate Division adopted Defendant's approach of looking at only one paragraph in a text and only one issue in a Complaint. It wrote:

> The only inaccuracy in the article's description was that it stated that plaintiff Misek-Falkoff "filed a lawsuit alleging that she was discriminated against because of her mental disability"; in fact, the IBM Action says Misek-Falkoff sued for discrimination based on a "neurological disorder" (854 F.Supp. at 226). This inaccuracy is not serious enough to remove defendants' reportage from the protection of .Civil Rights Law § 74

(The CPLR § 3211 dismissal was not converted to a merits ruling under § 3212 (for summary judgment), which would have emphasized the need for an Answer in the case and discovery).

Plaintiffs reasserted state and federal law in motions for leave to appeal; this was denied by the Appellate Division and the New York Court of Appeals, including on submission of a motion for rehearing.

REASONS FOR ALLOWANCE OF WRIT

A. The Appellate court denied equal protection and due process procedurally in multiple ways projecting impermissible treatment of persons with disabilities discriminatorily as an *underclass*.

Just as McDonald et al make no mention of physical pain or physical disability at all on their Web Page, Judge Brieant in a delphic and declaratory ruling on what in that case he sees as parody, as contrasted with the journalistic accusations lodged here, the appellate ruling makes no mention and does not make findings on accusations of malingering or taking away from others rights but he does document the disability as physical, which changes the whole meaning of all other facts in the cases.

1. The courts erred in dismissing this case under New York State CPLR 3211 in pre-Answer, pre-discovery status favoring the media, with no development of the Record for a jury to consider and plaintiffs as individuals blocked from making their own dispositive motions for relief due to lack of joinder at that early stage in the case; the courts erred eradicating all causes of action in the face of different sorts of injurious transactions.

The case where a physical disability was said to be mental and a bonafide federal court filing based on physical conditions said to be a real or manufactured mental claim under a then not yet enacted statute (and taking a former

federal suit from repose) was this point extinguished unexplored upon a pre-Answer, Pre-Discovery CPLR 3211 Motion to dismiss, with denial of repleading, and defendants not being required to answer (or plaintiffs being able to move, upon joinder, for documentary relief, or to on the timeline proceed with discovery to develop the Record.

The case was treated as disabled and Petitioner's true disabilities translated into different ones and spread on the records transformed.

2. The Appellate Decision misplaces reliance on a ,separate federal action (on a separate publication with separate list of defendants and different content, contexts, and tonality) filed later and decided on different grounds than those cited as to what was said to be protected under the First Amendment.

Notably, Judge Brieant in the Southern District of New York upon a Complaint concerning McDonald's later and strategically joke-laced "The Americans with Difficult Personalities Act" asserted that the facts of not getting along in the workplace when ill, in Judge Broderick's account, and the "parody" which Judge Brieant almost a decade later he held McDonald's piece to be, provided first amendment protections on that issue. Judge Brieant did not address other issues plead such as claims of Dr. Misek-Falkoff having no real ailment and typifying people filing disingenuously or in malfeasance as McDonald described it, under the ADA, and said to be taking away from others' rights — nor did he aver or rule that physical pain is a mental disorder. .

Even where issues regarding false accusations of mental illness self-descriptions could overlap or be seen to but only in very broad ways amenable to distinguishing under any close analysis, the matter should have been moot because no court ever decided these issues of imputed malingering where in fact as McDonald freely admits in the

litigation record subsequent that record he cares not that as recorded in federal case law which he claims to cite.

Dr. Misek-Falkoff had and has genuine and physical illness from which she suffered. No court has ever closely assessed McDonald's claim that the Broderick federal court decided (putatively under the ADA) that she was mentally disabled. (See e.g. Curry v. City of Syracuse, 2003 U.S. App. LEXIS 551 *14-15 (2d Cir. Jan. 15, 2003) (citing Fuchsberg & Fuchsberg v. Galizia, 300 F.3d 105, 109 (2d Cir. 2002); LaFleur v. Whitman, 300 F.3d 256, 271 (2d Cir. 2002 on the difference between issue preclusion and claim preclusion, where only one issue among multiple issues plead should not provide for dismissal; and each issue said to have been precluded must be seen as having been decisively disposed of).

The short shrift and inattention this case on disability discrimination and defamation received on the record is itself discriminatory and, dramatically, the issues involved have not received even minimal scrutiny.

> Under New York law, collateral estoppel prevents a party from relitigating an issue decided against that party in a prior adjudication. It may be invoked to preclude a party from raising an issue (1) identical to an issue already decided (2) in a previous proceeding in which that party had a full and fair opportunity to litigate. Additionally, the issue that was raised previously must be decisive of the present action." [*Ryan v. N. Y. Tel Co.*, 62 N.Y.2d 494, 500 (1984)].

B. The Appellate court denied equal protection and due process substantively in multiple ways projecting

impermissibly treatment of persons with disabilities discriminatorily as an *underclass.*[14]

1. The Appellate Court decision overlooks the threshold matter of the supervenance of per se defamation, which does not surrender to sliding scale notions of truth; the court's decision to decide itself how serious are inaccurate accounts of disabilities and those who suffer them is notably extreme.

The portal to Civil Rights § 74 - and especially clause the second affording relief to individuals targeted with abusive, false, and unfair reporting of judicial proceedings, including decisions and here federal decisions, should be blocked at the outset by medical fabrications and knowingly transducing one sort of disability into another. Clearly, reporting a physical disability a mental one matters:

The test is whether the published account of the proceeding would have a different effect on the reader's mind than the actual truth, if published....

> **If the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law." *Daniel***

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[14] In The Record Plaintiffs developed their materials reflecting authorities including Sack on Defamation, Prosser on Torts, and other treatises as well as on related commentaries in law reviews and legal secondary sources.. Also consulted and referenced are Medical Authorities and materials from the American Psychological Association and others including: The World Health Organization International Classification of Disease and Related Health Problems (ICD) 10; World Health Organization; and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) of the American Psychiatric Association., Also of record and in process of these suits, candidate amici have averred that they stand ready to put in briefs if authorized.

> ***Goldreyer, Ltd. v. Van de Wetering,* 217 A.D.2d 434, 630 N.Y.S.2d 18, 22 (1st Dep't 1995) (citations omitted). [*Procter & Gamble Co. v. Quality King Distributors, Inc.* 974 F.Supp. 190, *196 (E.D.N.Y.,1997)]. [Emphasis Supplied].**

In providing for reports of physical disabilities as mental ones the court encouraged false stereotypes and of a nature so as to prompt republications; the court improperly discounted that false attribution of mental unsoundness to persons with physical disabilities are actionable per se and not lawfully subject to subjective views on their being equivalent. [See Goldwater, Headnote, *supra*].

Here, it conflicts with the selfsame court's seminal holding in *O'Connor v. Field* 266 A.D. 121, *125, 41 N.Y.S.2d 492, **494 (N.Y.A.D. 1 Dept. 1943):

> Plaintiff sues for damages for libel. Defendant pleads as a defense that the article complained of was a fair and true report of a judicial proceeding. This defense has been stricken out, because it contained an admission by the Defendant that the publication complained of was to some extent inaccurate and erroneous... We think that under the present circumstances, including the inaccuracy in reporting, the question as to whether the report of Hill's testimony was substantially true and was a fair report, was for the jury. George v. Time, Incorporated, supra. 'And a fair and true report admits of some liberality; the exact words of every proceeding need not be given if the substance be substantially stated.' As was said concerning a defense of justification, in Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537, 538: 'A workable test is whether the libel as published would have a different effect on the mind *125 of the reader from that which the pleaded truth would have produced. [Underlining supplied].

Quite pertinent here, and in terms of the specifically invoked civil rights statute as it expounds the state's fealty

to the United States Constitution freedom of speech goals but also presumably thereby concomitant protection for reputation, in June of 2002 while this case was proceeding, in fact, a plaintiff in New York's Second Department prevailed against non-media Defendants and secured an injunction where it was falsely stated online that in his youth he spent a good deal of time in a mental institution; in fact this was false, he had spent time in a community living home for youth and the inaccuracy was found not privileged as Defendants averred under Civil Rights Law § 74; a jury trial was convened:

> [4] The court also rejects Defendants' claim based upon Civil Rights Law § 74 since Defendants' statement on the web sites that plaintiff was in a mental institution for much of his youth does not constitute a fair and accurate reporting of a judicial proceeding. Moreover, Defendants' reliance upon recent newspaper articles to show that Pleasantville is a psychiatric facility is misplaced as defense counsel never sought to introduce these articles at trial. ...In this regard, plaintiffs have obtained a judgment finding that the statements published by Defendants on their web sites were libelous, establishing the merits of their claim (State of New York v. Fine, 72 N.Y.2d 967, 968-969, 534 N.Y.S.2d 357, 530 N.E.2d 1277.
>
> [*Rombom v. Weberman* Not Reported in N.Y.S.2d. [Underlining supplied].

Other cases where inaccuracies in reporting of judicial proceedings have surfaced also have given rise to juries either shorn of privilege defenses or for the jury to weigh them [Ocean, infra].

To do otherwise is contra the New York State Constitution, at I.8:

[Article I—Bill of Rights, (Volume XXIV, Issue 53, December 31, 2002) .

[Freedom of speech and press; "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right" [McKinneys, N.Y. Const. Art. 1.8, as amended].

And consider the consonant ruling of this court as follows:

Restatement of Torts § 611. The conditional privilege of the news media may be defeated, however, by "'want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication.' The failure to employ such 'reasonable care and diligence' can destroy a privilege which otherwise would protect the utterer of the communication. [*Rosenbloom v Metromedia, Inc..,* 403 U.S.. 29 No. 66, Argued December 7-8, 1970, Decided June 7, 1971].

2. The Appellate Decision impermissibly overrode long decided federal case law involving Petitioners past filings under federal statute and in so doing censured and curtailed Petitioners' own constitutional free speech rights and Right to Petition, as well as the right to rely on the law's settled Record.

Revisiting the facts of an old employment case instead of looking at present facts surrounding defamation seems patently invalid. It is an important question warranting Supreme Court review, as to equal rights of free speech and to petition, if individuals with disabilities — regardless of whether they happen to have prevailed or been dismissed in employment suit actions — in future nexus of transactions and occurrences have the right to petition the government on their grievances as here regarding

defamation.. Reasonable enjoyment of such rights should hold under all sorts of rubrics (and under whatsoever possible suspect or other class tests for standards of scrutiny as minimal, heightened, or strict might apply contextually; but here there is a serious question whether minimal standards are met).

The First Amendment conveys the right to petition in one's own name and causes, free from retaliation or censorship. To wit:

> Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the " `public airing of disputed facts,' " Bill Johnson's, supra, at 743 (quoting Balmer, Sham Litigation and the Antitrust Law, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around.
>
> Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L. J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims). *B. E. Construction v. National Relations Board et al.*, Certiorari to the U.S. 6th Circuit Court of Appeals, No. 01-518 (2002) Decided.

he Appellate Decision declaring false reports of medical diagnoses and case outcomes to be privileged, and inaccuracies not serious, improperly and stereotypically with prejudice invades the provinces of jury and physicians, and exceeds judicial powers by re-diagnosing medical matters — and in peremptory fashion disallowing jury assessment of evidence by witnesses expert and lay and the

otherwise and additional orderly proffer of evidence by pro se persons with disabilities in their own voice.

Converting disabilities the Court invokes § 74, exposing its perhaps unconstitutional nature due to vagueness and overbreadth, but here not even applying its decisional law to the instant facts and issues. The court's position here that one disability is like another, in essence, took away the right to a jury, which the Civil Rights law they cite is meant to assure.

> We are similarly of the view that a jury question is also presented with respect to Defendants' defense that the article's account of the imposition of a fine against plaintiffs in Justice Court was statutorily privileged as a "fair and true report of any judicial proceeding" (Civil Rights Law § 74). The "neutral reportage" privilege does not apply when the news account of the judicial proceeding is combined with other facts or opinions to imply wrongdoing.... *resolution of* this defense must also await a plenary trial. [*Ocean State Seafood, Inc. v. Capital Newspaper, Div. of Hearst Corp.* 112 A.D.2d 662, *664, 492 N.Y.S.2d 175, **177].The privilege does not attach either, as the Civil Rights Law sec. 74 states in the second and concluding clause 2, if what is reported did not happen at all or if grossly irresponsible alterations recast the material contents of judicial proceedings.
>
> If the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding, then the privilege does not attach, as a matter of law (Ocean State Seafood v. Capital Newspaper, 112 A.D.2d 662, 666, 492 N.Y.S.2d 175). [Procter & Gamble Co. v. Quality King Distributors, Inc. Procter & Gamble Co. v. Quality King Distributors, Inc. 974 F.Supp. 190 E.D.N.Y., 1997.

And:

> True it is that a publisher "who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own ... cannot rely on a privilege of neutral reportage." [*Edwards*, 556 F.2d at 120].

That a jury could reflect the apprehension of the public in this regard is crystallized in the current existence on "The Web" of many hundreds of references to "Cyberlibel" at one recent point; it is a now well recognized word and concept of which upon an Internet search judicial notice could be taken. No one yet does seem to - nor can anyone ever be expected - to, know how to retract or repair online defamation (See complications in *Rombom*). This is why it is especially fearsome, because indelible, untraceable, and likely to appear ('pop up") repeatedly on computers in predictable as well as unanticipated occasions and contexts.[15]

Careful finding of fact on 'reasonable reader/viewer' grounds would shine light on the especially serious falsities of ascribing quotations regarding the self.

> (b) A trier of fact in this case could find that the reasonable reader would understand the quotations attributed to *Masson* to be nearly verbatim reports of his statements. [*Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496,111 S. C (U.S. Cal, 1991)].

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[15] Defendants at Oral Argument before the Appellate Panel acceded to a judge's query whether the prior print publication and the new internet web page publication would look different or the same if he looked at them. {See The Record, Plaintiffs' submissions of very different images and contents of a prior, print edition and the later web site [Opposition to Motion to Dismiss, Figures 1 and 2]. Thereafter, the appellate panel passed over Judge Lehner's dismissal of suit as an untimely one. If however any issue remains then the importance of these matters universally warrants this high court's review based on this case..

3. The Appellate decision also goes beyond the court's reasonable powers in getting into areas of medicine and psychology, the court exceeded its powers to rule on cases and controversies presently and not re-decide past cases not before them and in repose.

4. And, notably, The court erred in refusing to follow well-settled principles of text analysis in defamation contexts and respect to other ;harms and injures.

It's its practices colliding with governing standards for approaching defamation suits and thereby deprived Petitioners of availance to established truth preserving processes and substantive legal protections. What is vital is not what the court thinks about disabilities being swapped but what the public might think.

> It has long been our standard in defamation actions to read published articles in context to test their effect on the average reader, not to isolate particular phrases but to consider the publication as a whole"). *Immuno AG v. Moore-Jankowski*, 77 N.Y.2d 235, 250 (1991)

It is well settled that particular words, sentences and paragraphs should not be hypertechnically examined outside of contexts. Nor should issues in complaints save one be disregarded (*Holy Spirits Assn. For Unification of World Christianity v.New York Times Co.*, 49 N.Y.2d 63, 424 N.Y.S. 2d 165, 399 N.E.2d 1185) . the total text must be the included should Judge Broderick, for example, was careful, cautious, and complete in this regard:

The allegedly libelous statements can be categorized as follows: (1) *The Religious Controversy:* statements 1, 2, 4, 5, 12, 13, and 14 deal exclusively with the religious controversy surrounding plaintiffs; (2) *The Business Controversy:* statements 3, 6 and 7 pertain solely to the

business controversy surrounding plaintiffs; (3) *Hybrid statements:* statements 10 and 11 pertain to both the religious and the business controversy; and (4) *Father O'Reilly's marital status:* statements 8 and 9 address the marital status of one of the individual plaintiffs... [grant summary judgment to Defendant with respect to plaintiffs' second (in part), third, sixth, seventh, eighth, ninth, and thirteenth claims because they are either not defamatory or not false or both. [*Contemporary Mission, Inc. et al v. New York Times*, 665 F. Supp. 248 (S.D.N.Y 1987

C. The Appellate Court's decision sets the stage for prohibited discrimination in the future, abrading constitutional protections meant to be afforded equally, and affecting the very large number of persons with disabilities.

It is patent and the public is increasingly aware that millions of persons with disabilities of any type, be they physical, mental, intellectual, or otherwise can be affected where short shrift and sub-minimal response to their valid grievances is allowed to go unchecked under color of law.

SUMMARY

Query does a court act within the proper powers and roles of judicial bodies, or does it outside of those powers hazard discrimination and conflict with the principles of faithful recordation due to portability of sensitive medical matter electronically encoded, when on its own initiative, without hearings with expert or lay witnesses or taking a case to a jury, it replaces a an established medical diagnoses with its own and different one, and re-classifies a neuropathic pain condition as a mental disorder or malfeasant pose, and allows mischaracterizations of

particular persons and particular diagnoses to circulate electronically?

It is respectfully submitted that this case warrants High Court Review in that the federal and state-referencing federal based protections extended to media here are misplaced and individual rights trammeled under the very selfsame First Amendment and derivative statutes meant to balance interests not curtail them. There is no medical or common understanding basis for the holding of privilege against suit for derogation of an false reporting of a disability, all the more so a blatant misreport of a judicial decision.

Persons with disabilities are not all alike or interchangeable and are not properly to be shuffled about in the annals of history. The discrimination the defendants brought to court here by refusing plaintiffs request before suit that they simply reread just even the first pages of a federal suit and set the record straight between them, is very broad and very basic indeed. It bears on human rights as well as civil rights and quality of life for libel victims.

The Decision of the Appellate Court along with the procedural short shrift this whole case has been given, violates Petitioners' First, Fifth, and Fourteenth Amendment Rights [App Pet A] , and sets things up for many to hereafter fall where inaccurate reports of judicial proceedings including what is said of federal case law now are removed from repose. It took the former federal district court many years to decide the former case cited. There was an answer. There was discovery. The court described a physical and severe pain of Trigeminal Neuralgia.

The Appellate Division here now says essentially that doctors are wrong. That people suffering pain are wrong. That Judge Broderick was wrong. That he and a federal court's decision overridden where well in repose; and not before the present decisional body which chose to return to a

decades old employment nexus rather than process a present case of defamation and other types of considerable injuries.

CONCLUSION

The Petitioners humbly request that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Most Respectfully Submitted,

Dr. Linda D. Misek-Falkoff
Adin Falkoff
Petitioners pro se
79 Grandview Ave.
Pleasantville, NY 10570

(914) 769-3652.

APPENDIX

APPENDIX A — PROVISIONS OF LAW

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the U.S. Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, that according to the rules of common law.

The Fourteenth Amendment to the U. S. Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Americans with Disabilities Act provides:

Who Is Protected Under the ADA? The ADA protects qualified *individuals* with disabilities. An *individual* with a disability is a person who has a physical or mental impairment that substantially limits major life activities; has a record of such an impairment; or is regarded as having such an impairment. Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Under the ADA, a qualified *individual* with a disability is an *individual* with a disability who meets the essential eligibility requirements for receipt of services or participation in programs or activities. Whether a particular condition constitutes a disability within the meaning of the ADA requires a *case-by-case determination.* (The Office for Civil Rights, Your Rights Under the AMERICANS WITH DISABILITIES ACT – web site address: http://www.hhs.gov/ocr/ada.html).

New York State Constitution, Article I.8 provides:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

New York State Civil Rights Law, Article 7 § 74 provides:

Privileges in action for libel. A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

APPENDIX B — Decision and Order, New York Supreme Court, Appellate Division, First Department (December 31, 2002).

Linda D. MISEK-FALKOFF, et al., Plaintiffs-Appellants,
v.
AMERICAN LAWYER MEDIA, INC., et al., Defendants-Respondents.

Index No. 103099/00
Dec. 31, 2002.

WILLIAMS, P.J., MAZZARELLI, BUCKLEY, FRIEDMAN and MARLOW, JJ.

Order, Supreme Court, New York County (Edward Lehner, J.), entered September 28, 2001, which, inter alia, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

In this action, plaintiffs, who are married, bring claims for defamation, invasion of privacy, interference with prospective economic advantage, false light publicity, intentional and negligent infliction of emotional distress, and loss of consortium, based on an article written by defendants James J. McDonald, Jr. and Charles A. Conine. The McDonald/Conine article contains one paragraph describing plaintiffs' action entitled *Misek-Falkoff v. Intl. Bus. Mach. Corp.*, 854 F.Supp. 215, *affd.* 60 F.3d 811, *cert. denied* 516 U.S. 991, 116 S.Ct. 522, 133 L.Ed.2d 429 (the IBM action).

In another Federal action brought by plaintiffs based on an article written by McDonald alone (*Misek-Falkoff v. McDonald,* 177 F.Supp.2d 224), plaintiffs alleged the same types of claims alleged here, namely, defamation, invasion of privacy, false light publicity, interference with prospective

economic advantage, intentional and negligent infliction of emotional distress, and loss of consortium. The paragraph about the IBM Action in the McDonald article is, in sum and substance, the same as the paragraph about the IBM Action in the McDonald/Conine article.

The *McDonald* court granted defendants' motion to dismiss, stating that the McDonald article's discussion of the IBM Action was " not so removed from the facts as to lose its First Amendment protection as a fair report of a public judicial proceeding" (177 F.Supp.2d at 231). The *McDonald* court dismissed the remaining causes of action, stating: "All of these separate claims merge in the defamation and do not give rise to any relief from this Court based on separate legal theories" (*id.* at 232).

[1] Because plaintiffs had a full and fair opportunity to litigate the *McDonald* case and because the issues in the *McDonald* case are the same as the ones here, collateral estoppel applies (*see generally Kaufman v. Eli Lilly & Co.,* 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 482 N.E.2d 63; *Ryan v. New York Tel. Co.,* 62 N.Y.2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487), and the complaint was properly dismissed.

The fact that plaintiffs have appealed the District Court's decision in *McDonald* does not preclude our reliance upon the doctrine of collateral estoppel (*see e.g. Matter of Capoccia,* 272 A.D.2d 838, 847, 709 N.Y.S.2d 640). In any event, we also conclude, independently, that dismissal of the complaint is mandated pursuant to Civil Rights Law § 74, which forbids the maintenance of a civil action "against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding...."

[2][3] Plaintiffs contend that the McDonald/Conine article was not a fair and true report of the IBM Action. However, "[f]or a report to be characterized as 'fair and true' ..., it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for the Unification of World Christianity v. New York Times Co.,* 49 N.Y.2d 63,

67, 424 N.Y.S.2d 165, 399 N.E.2d 1185). The only inaccuracy in the article's description was that it stated that plaintiff Misek-Falkoff "filed a lawsuit alleging that she was discriminated against because of her mental disability"; in fact, the IBM Action says Misek-Falkoff sued for discrimination based on a "neurological disorder" (854 F.Supp. at 226). This inaccuracy is not serious enough to remove defendants' reportage from the protection of Civil Rights Law § 74 (*see e.g. Gurda v. Orange County Publs. Div. of Ottaway Newspapers, Inc.*, 56 N.Y.2d 705, 451 N.Y.S.2d 724, 436 N.E.2d 1326).

Since Civil Rights Law § 74 bars all of plaintiffs' claims, it is unnecessary to address the parties' other arguments regarding each individual cause of action.

752 N.Y.S.2d 647, 300 A.D.2d 215, 31 Media L. Rep. 1447, 2002 N.Y. Slip Op. 11087

APPENDIX C — Order of Dismissal, New York Supreme Court, First Department, IAS Part 19 (September 24, 2001).

LINDA D. MISEK-FALKOFF and ADIN FALKOFF,
Plaintiffs,

- against -

AMERICAN LAWYER MEDIA, INC.; NEW YORK LAW PUBLISHING COMPANY; LAW.COM, INC.; U.S. EQUTY PARTNERS, L.P.; JAMES J. MCDONALD, Jr., Esq.; CHARLES A. CONINE; STEPHEN C. JACOBS, Esq.; THE NATIONAL LAW JOURNAL; AMERICAN LAWYER MEDIA HOLDINGS, INC; and FISHER & PHILIPS, LLP,

Defendants.

INDEX NO. 103099/2000

EDWARD H. LEHNER, J.:

Before the court are defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)1 and 7, and a cross-motion by plaintiffs for various relief. In this action plaintiffs seek damages by reason of alleged defamatory and other intentional conduct on the part of the defendants.

In 1989 plaintiffs commenced an action against International Business Machines Corp. ("IBM") in the United States District Court (SDNY) contending, inter alia, that IBM had engaged in discriminatory conduct against plaintiff Linda Misek-Falkoff by reason of a disability from which she suffered. In 1994 the action was dismissed by the federal court upon a motion for summary judgment by IBM (854 F. Supp. 215). The determination was affirmed by the

Second Circuit (60 F.3rd 811), and certiorari denied by the United States Supreme Court (516 U.S. 991). The essence of the court's decision was that IBM had not engaged in discriminatory conduct against plaintiff in placing her on permanent disability. The court determined that while she was technically qualified for her position, the employer's decision was justified because of plaintiffs "inability to get along in the workplace, and to unpredictable, extended absences from the workplace" (854 F Supp. at p.228).

In 1997 defendant National Law Journal published an article written by defendants McDonald and Conine concerning employment law and mental illness wherein the above noted federal court decision was discussed.

In 2000 plaintiffs commenced the instant action consisting of sixteen causes of action asserted in a rambling complaint containing 505 paragraphs spread over seventy one pages, with additional exhibits annexed thereto. Plaintiffs have asserted ten causes of action sounding in defamation, as well as causes of action alleging civil rights violations, interference with prospective economic opportunity, false light publicity, and intentional and negligent infliction of emotional distress. Plaintiff Adin Falkoff asserts a cause of action for loss of consortium.

A one year statute of limitations applies to the first ten causes of action asserted in the complaint wherein a recovery is sought by reason of the alleged defamatory conduct of the defendants [CPLR §215(3)]. A cause of action in defamation accrues at the time of the first publication of the matter alleged to be defamatory [Tomasino v. Morrow & Company, Inc., 174 A.D.2d 734 (2nd Dept. 1991); Bassim v. Hassett 184 AD2d 908 (3rd Dept. 1992)]. Publication is deemed to have occurred when the allegedly defamatory matter becomes available to the public. Subsequent availability of the allegedly defamatory matter in a different medium, such as the internet as is alleged herein, does not create the accrual of a new time frame for the purpose of

making such a computation [see, Bassim v. Hassett, supra; Firth v. State of New York, 184 Misc2d 105 (Ct. of Claims 2000)].

In the matter at hand, the allegedly defamatory matter became available to the public on the date of its first publication in the National Law Journal on February 24, 1997. The instant action having been filed in 2000 was therefore time barred. Thus, the first ten causes of action asserted in the complaint sounding in defamation are dismissed.

Plaintiffs' allegations respecting alleged civil rights violations, specifically Civil Rights Law §51, likewise bear a one year time limitation for the commencement of an action running from the time of actual publication of the violative matter. In the instant action the alleged statutory violation occurred on February 24, 1997, with the initial publication of the article at issue. This cause of action is therefore likewise time barred [see, Costanza v.Seinfeld, 279 A.D.2d 255(1st Dept. 2001)].

Furthermore, plaintiffs have failed to assert a lack of "newsworthiness" with respect to the alleged offending matter. The court upon examination of the 1997 article finds that same is in fact newsworthy as a matter of law [see, Messenger v. Gruner & Jahr Printing and Publishing 94 NY2d 436 (2000)]. The failure by the plaintiffs to allege a lack of newsworthiness respecting the publication at issue renders this cause of action subject to dismissal.

As to the cause of action seeking a recovery by reason of alleged tortious interference with a business opportunity, the complaint fails to set forth necessary allegations that the interference at issue resulted from an unlawful act or that same was motivated solely by malice [see, Pamilla v. Hospital for Special Surgery 223 AD2d 508 (1st Dept. 1996)]. The failure by the plaintiffs to plead such necessary element in their complaint requires dismissal of this cause of action.

The cause of action for a recovery based upon "False Light Publicity" is dismissed as same is not actionable in New York [see, Freeman v. Johnston 192 AD2d 250 (1st Dept. 1993)].

With respect to allegations that defendants had perpetrated an intentional infliction of emotional harm, said cause of action is governed by the one year time limitation set forth at CPLR §215(3) [see, Goldner v. Sullivan, Gough, Skipworth, Summers & Smith 105 AD2d 1149 (4th Dept. 1984)]. The alleged harmful act having taken place in 1997 renders this cause of action time barred.

Furthermore, a necessary element of a cause action for either intentional and/or negligent infliction of emotional harm, requires that alleged harm rise to an extreme level of offensive conduct [Freihofer v. Hearst Corporation, 65 NY2d 135 (1985)]. The newspaper article at issue in no way rises to anything approaching such a level. Thus a viable cause of action has not been stated.

APPENDIX D1 — 1 Order Denying Leave to Appeal, New York Supreme Court, Appellate Division, First Department April 8, 2003).

[N. B. The extension of time was moot as the papers were timely filed].

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on April 8, 2003.

PRESENT: Hon. John T. Buckley, Presiding Justice
Angela M. Mazzarelli
Milton L. Williams
David Friedman
George D. Marlow, Justices.

x----------x

Linda D. Misek-Falkoff, et al.,
Plaintiff-Appellants,
....against
American Lawyer Media, Inc., et al.,
Defendants-Respondents.

x----------x

M-871
M-609
Index No. 103099/00

Plaintiffs-appellants having moved by separate motions for an enlargement of time within which to file a motion for reargument or for leave to appeal to the Court of Appeals from the decision and order of this Court entered on December 31, 2002 (Appeal No. 2708) [M-609] and for summary reversal of the aforesaid decision and order, a certificate of appeal or leave to appeal to the Court of Appeals [M-871],

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motions are denied.

ENTER:

(S)Catherine O'Hagan Wolfe

CLERK

APPENDIX D2 — Order Denying Leave to Appeal, New York State Court of Appeals (July 2, 2003)

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Second day of July 2003

Present, HON. JUDITH S. KAYE, *Chief Judge, p residing.*

1-10 Mo. No. 581
Linda D. Misek-Falkoff et al..,
Appellants,

American Lawyer Media, Inc.,
et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

____ [signed] ___
Stuart M. Cohen
Clerk of the Court

APPENDIX D3 — Order Denying Reargument, New York State Court of Appeals (September 11, 2003).

Court of Appeals of New York
September 11, 2003

(100 NY2d 508)

MOTIONS FOR REARGUMENT OR RECONSIDERATION

denied

Copr. (c) 2003, Randy A. Daniels, Secretary of State, State of New York.

N.Y,2003.
Misek-Falkoff v American Lawyer Media, Inc.
(The decision of the Court of Appeals of New York is referenced in the New York Supplement and North Eastern Reporter in a "Table of Decisions Without Published

APPENDIX — E Extension of Time to File Petition

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 1, 2003

Ms. Linda D. Misek-Falkoff
79 Grandview Avenue
Pleasantville, NY 10570

Re: Linda D. Misek-Falkoff, et al,
v. American Lawyer Media Inc., et al
Application No. 03A462

Dear Ms. Misek-Falkoff:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on December 1, 2003 extended the time to and including February 8, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter,
Clerk

By Ruth Jones Case
Analyst

APPENDIX — F Affidavit of Dr. George Popper supporting correction of medical misstatements; from the Record in this case.

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GEORGE POPPER, PH.D.
NEW YORK STATE LICENSED PSYCHOLOGIST
LICENSE 5105

AFFIDAVIT IN OPPOSITION TO DISMISS THE COMPLAINT 103099/00

I am a duly licensed Psychologist in the State of New York with over 25 years experience in clinical practice. I am also certified by the Law Guardian Panel and I have performed numerous forensic evaluations of persons of all ages. Also, as a part of my practice, I use computers and often employ them in a variety of ways. Needless to say, I have extensive, first hand experience with the Internet. I therefore state the following with a high degree of professional certainty:

I have known Dr Misek-Falkoff for many years, which included a time shortly after she was treated by major neurosurgery for Trigeminal Neuralgia, a painful, debilitating condition, and it was with extreme dismay that I saw her name included in an online article available virtually everywhere and entitled

"Mental Illness Won't Excuse Bad Job Performance: Workers with mental disorders covered by the ADA must still perform key functions of a job."

As the title clearly states, this is about individuals suffering from a "mental" problem and not a "physical" one. While it is true that there often can be behavioral

manifestations of a physical illness, e.g., fatigue, irritability, etc. it would be very wrong to assert that these behaviors are as a result of a mental defect.

To contend that Dr. Misek-Falkoff falls into the category of those who have or have had a "mental" disability or so claimed completely negates the reality of her "physical" problem. Saying that she so characterizes herself is even worse. Moreover, placing these false statements on the Internet, where it is readily available for all to see does her a great injustice and has caused her considerable personal harm.

I have read the Internet publication online and McDonald, et al. statements there of reliance on the certain well established psychological assessment tools on the part of the EEOC/American with Disabilities Act guidelines for mental applications for accommodation. I have also read the Motion submitted by Defendants. First, in their online publication, the DSM-based case of Boldini, rather well known to my field, but here wrongly footnoted Dr. Misek-Falkoff's case, is extremely misleading. Secondly, the Defendants' contention in their Motion regarding what I view as the 'disclaimer' and scoping portion of the Preface to The American Psychiatric Association Diagnostic and Statistical Manual (DSM-IV), and their assertion that there is no real distinction between physical and mental illnesses, contradicts the very purpose of the DSM-IV itself.

In their writings, Defendants claim reliance on the DSM for classifications of mental disorders. Clearly, the DSM volume was created for purpose of making such a distinction in the first place. It is my view that the present argument- that there is no true distinction between physical and mental maladies - is false as well seriously inconsistent.

Dr. Misek-Falkoff's medical history, and the Federal Rehabilitation Act Order detailing it, which I have also read, clearly indicates what her problem was. Regrettably, the

authors and publishers apparently have decided to say on their own that it was really something else.

George Popper, Ph D.
NYS Licensed Psychologist

(Affirmed as if sworn, signed 3/23/2001)

International Classification of Diseases

350 Trigeminal nerve disorders
Includes: disorders of 5th cranial nerve
350.1 Other trigeminal neuralgia
350.2 Atypical face pain
350.8 Other
350.9 Unspecified

APPENDIX G — Case Law Citations to Neuralgia/Trigeminal Neuralgia as a severe physical pain condition.

Connecticut Mut. Life Ins. Co. v Union Trust Co., 112 U.S. 250, 5 S.Ct. 119, 28 L.Ed. 708 (U.S.N.Y., Nov 17, 1884)

...heart, palpitation, aneurism, disease of the urinary organs, syphilis, rheumatism, gout, **neuralgia,** dropsy, scrofula, small-pox, yellow fever, and cancer or any tumor. ...

Manson v Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (U.S.Conn., Jun 16, 1977) (NO. 75-871)

...heart . . . high blood pressure . . . **neuralgia** in my face, and sinus," id., at 106), and that...

*Ewing v*L.Ed. 1088 (U.S.Dist.Col., May 29, 1950) (NO. 568)

...caries, Irregular heartbeat, Colitis, Craving for sour foods, Arthritis (rheumatism), **Neuralgia,** Deafness, Subject to colds.' This version is the basis for...

Rafaniello v Apfel, 60 Soc.Sec.Rep.Serv. 46 (E.D.N.Y., Feb 23, 1999) (NO. 98-CV-4354(JG))

... **trigeminal neuralgia.** [FN2] (Id.) Rafaniello also saw Dr. Anthony J. Sarro in August of 1992 regarding the pain he was experiencing in his face. (Tr. 93.) Dr. Sarro, like Dr. Marino, diagnosed Rafaniello as suffering from **trigeminal neuralgia.** (Id.) Dr. Sarro noted that Rafaniello was undergoing long-term therapy with the medication Tegretol, [FN3] and between August of 1992 and November of 1995, Rafaniello met with Dr. Sarro three times. (Id.) FN2. **Trigeminal neuralgia** refers to pain of the face affecting the region supplied by the **trigeminal** nerve. See 4 J.E. Schmidt, M.D ., Attorney's Dictionary of Medicine N-68 (defining **neuralgia);** 6 id. at T- 243 (defining **trigeminal neuralgia).** The **trigeminal**

Herring v Hayes, 135 A.D.2d 684, 522 N.Y.S.2d 583 (N.Y.A.D. 2 Dept., Dec 21, 1987) (NO. 3413E)

... the natural progression of a disease called **trigeminal neuralgia.** The plaintiff repeatedly suffered its symptoms,

Hodge v. Coughlin, (S.D.N.Y., Sep 22, 1994) (NO. 92 CIV. 0622 (LAP))

... **trigeminal** nerve. Tr. at 99. The **trigeminal** nerve is one of the cranial nerves affecting the eye, face and forehead. Id. Some of the effects of herpes zoster ophthalmicus are deep inflammation and scarring of the skin, **neuralgia,** [

Misek-Falkoff v International Business Machines Corp., 854 F.Supp. 215, 3 A.D. Cases 449, 5 A.D.D. 569, 5 NDLR P 154 (S.D.N.Y., May 13, 1994) (NO. 89 CIV 6269 (VLB))

... pains and other symptoms associated with atypical **trigeminal neuralgia,** a disorder of the nervous system, [FN6]

Misek-Falkoff v. McDonald, 177 F.Supp.2d 224 (S.D.N.Y., Nov 19, 2001) (NO. 01 CIV 0816 (CLB))

... part, on a "debilitating pain condition of **Trigeminal Neuralgia"**, which she developed in or about 1980

Seymour v Roe, N.Y. Slip Op. 10570 (N.Y.A.D. 3 Dept., Jan 30, 2003) (NO. 92040)

... **neuralgia."** Defendant's only other proof in support of his motion was a February 2000 letter to Schroyer from the neurologist who treated her for cervical tenderness and headaches and concluded that she had "[c]ervicogenic and post-traumatic headache with [a]

Hoagland v Kamp, 155 A.D.2d 148, 552 N.Y.S.2d 978 (N.Y.A.D. 3 Dept., Mar 22, 1990) (NO. 58882)

...improperly diagnosed and treated plaintiff Audrey Hoagland's **trigeminal neuralgia,** a painful nerve disorder commonly known as

Lichtman v. Heit, 2002 N.Y. Slip Op. 11101 (N.Y.A.D. 1 Dept., Dec 31, 2002) (NO. 1977)

... **neuralgia** paresthetica," denoting severe, stabbing or throbbing pain in the course or distribution of a nerve, involving numbness and tingling in the affected extremity (Stedman's Medical Dictionary 1206, 1316 [27th ed 2000]). This finding is consistent with that of the

U.S. v. Khmelnitsky, 89 A.F.T.R.2d 2002-1661 (S.D.N.Y., Mar 25, 2002) (NO. 01 CR.890 RWS)

... problems, ulcers, and a rare disorder named **trigeminal neuralgia** (intense facial pain that radiates throughout the

Callahan v Forest, 118 N.Y.S. 541 (N.Y.Sup., Jan 1909)

... 1908, he was taken seriously ill with **neuralgia** of the heart, more technically known as

Meacham v. Knolls Atomic Power Laboratory, 185 F.Supp.2d 193 (N.D.N.Y., Feb 13, 2002) (NO. 97-CV-12 (DRH), 97-CV-45 (DRH))

... at 29- 30. Stannard also experienced **trigeminal neuralgia.** [FN27] These problems persisted in diminished

Morris v. New York, O. & W. Ry. Co., 6 Am.Negl.Cas. 35, 73 Hun 560, 56 N.Y.St.Rep. 231, 26 N.Y.S. 342 (N.Y.Sup.Gen.Term, Dec 01, 1893)

... not say the plaintiff's injury was intercostal **neuralgia,** and he said he did. No

H.A. Metz Laboratories v Blackman, 153 Misc. 171, 275 N.Y.S. 407 (N.Y.Sup., Oct 08, 1934)

...for the treatment and alleviation of headache, **neuralgia,** colds, influenza, rheumatism, and other ailments, under

Edison v. Continental Chemical Co., 220 F. 398 (S.D.N.Y., Nov 30, 1914) (NO. 10-74)

...then thought would be useful as a **neuralgia** remedy. He made an application for

People ex rel. Young v Sturgis, 85 A.D. 20, 82 N.Y.S. 953 (N.Y.A.D. 2 Dept., Jun 12, 1903)

...other. He also suffers from continued **neuralgia."** On September 5th the relator was

Fane v. National Ass'n Railway Mail Clerks, 197 A.D. 145, 188 N.Y.S. 222 (N.Y.A.D. 4 Dept., May 11, 1921)

... A man named Pixley was suffering from **neuralgia.** He sent to the drug store

Fort v. Brown, 46 Barb. 366 (N.Y.Sup.Gen.Term, 1866)

... injury, I could readily believe that the **neuralgia** might have been caused by it; I

Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U.S. 250, 5 S.Ct. 119, 28 L.Ed. 708 (U.S.N.Y., Nov 17, 1884)

... of the urinary organs, syphilis, rheumatism, gout, **neuralgia,** dropsy, scrofula, small-pox, yellow fever, and

Munn v. City of Hudson, 61 A.D. 343, 70 N.Y.S. 525 (N.Y.A.D. 3 Dept., May 08, 1901)

... January, 1897, she began to suffer from **neuralgia** and pain in her head and ear,

APPENDIX H — 1999 NEW INTERNET EDITION, DEFENDANT'S "Mental Illness Won't Excuse Bad Job Performance Workers with mental disorders covered by the ADA must still perform key functions of a job."

By James J. McDonald Jr. and Charles A. Conine

SPECIAL TO THE NATIONAL LAW JOURNAL

The National Law Journal (p. C09) Monday, February 24, 1997

SINCE THE enactment of the Americans With Disabilities Act, or ADA, in 1992,[1] employers are obligated not only to avoid discriminating against the disabled, but to "reasonably accommodate" employees with disabilities. When it enacted the ADA, Congress included protection for workers with mental disabilities as well as for employees with physical handicaps.

The ADA's coverage of mental disabilities is broadly worded, however, and the concept of mental illness itself is vague. Employers are faced with the challenge of understanding and managing mental health issues in the workplace.[2] While this area of the law is developing and many uncertainties exist, employers can take steps to protect themselves from ADA claims by employees asserting mental disabilities.

There is a three-step inquiry for determining whether an allegedly disabled individual is protected by the ADA: whether the person has a covered disability; if such a disability exists, whether it substantially limits one or more of the individual's major life activities; and, despite the disability, whether the individual can perform the essential functions of the job, with or without reasonable accommodation. The person will be protected by the ADA only if all three elements are met.

Equal Employment Opportunity Commission regulations define ADA-covered mental disabilities to

include any "mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[3] The scope of covered mental disabilities, however, is not as broad as this definition suggests.

The ADA's legislative history indicates that Congress only intended to cover mental disorders defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, the current edition of which is known as DSM-IV.[4] DSM-IV is the diagnostic bible of the mental health professions. Mental disorders, such as depression, anxiety or post-traumatic stress disorder, are usually listed in the manual only after wide consensus among mental health professionals concerning the existence of the disorder and its diagnostic criteria. Thus, fanciful diagnoses such as "chronic lateness syndrome," which are not contained in DSM-IV, are not covered by the ADA.

Even if a condition is a diagnosable mental disorder as defined by DSM-IV, in order for it to trigger ADA coverage it must "substantially limit" one or more major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, reading, learning, sitting, standing, lifting, reaching or working.[5] The issue of whether a person is substantially limited in working is considered only when the individual is not substantially limited in any other major life activity.[6]

An individual with a disability that prevents him or her from performing only a particular job, however, is not considered to be substantially limited in working.[7] This limitation excludes many job stress claims from ADA coverage. For example, in *Weiler v. Household Finance Corp.*,[8] the court rejected an ADA claim in which the plaintiff claimed that her boss' yelling caused her to become depressed and anxious. The court reasoned that just being unable to work for one particular supervisor does not qualify as an ADA disability.[9]

Temporary, nonchronic impairments that have little or no long-term impact typically are not covered by the ADA. Thus, conditions such as a broken leg that heals normally, sprains, concussions, colds and the flu do not qualify as disabilities under the ADA.[10] This principle also applies to mental disabilities. Temporary emotional problems attributable to marital or family conflict, or to grief over the loss of a loved one, do not qualify as covered disabilities under the ADA.[11]

Personality Disorders

Personality disorders present a closer coverage question. These are chronic, pathological patterns of behavior that typically date back to a worker's adolescence and often make it difficult to get along with others in work and social contexts. Many problem employees have traits of one or more personality disorders. Management of employees with personality disorders can be extremely difficult because these people likely have engaged in the same dysfunctional patterns of behavior for a long period and generally lack insight into the effect of their behavior on others.

Recent legal developments indicate that at least some personality disorders may be covered by the ADA. The EEOC issued a March 15, 1995 memorandum on the definition of "disability" stating that "mental and emotional processes such as...interacting with others are examples of major life activities,"[12] but at least one court has reached an opposite conclusion.[13]

Just because an employee's mental or personality disorder is covered by the ADA and it substantially limits one or more major life activities does not necessarily mean that the employee is protected by the ADA. The most important step of the three-pronged inquiry for determining ADA coverage is the third factor--whether the employee is able to perform the essential functions of the job, with or without a reasonable accommodation.

Mental Job Functions

Although manual duties may first come to mind when considering the essential functions of a job, the trend among recent decisions is toward recognizing that most jobs have intangible elements as well, such as the ability to handle job stress, accept direction from a supervisor and get along with co-workers.

For example, in *Johnston v. Morrison Inc.*,[14] a waitress was found unable to perform the essential functions of her job in which the stress of the peak serving hours caused her to "melt down." The ability of a waitress to communicate effectively with customers and handle the pressure of serving many customers simultaneously were considered essential functions of the job. Similarly, in *Larkins v. CIBA Vision Corp.*,[15] a customer service representative whose panic attacks prevented her from answering telephone calls was found unable to perform the essential functions of her job.

In *Palmer v. Cook Co. Circuit Court*,[16] this concept was taken a step further. That case involved an employee who had no trouble performing the various substantive duties of her job but who was unable to get along with her supervisor and co-workers. The court rejected her ADA claim, holding that regardless of her ability to perform her job duties, her inability to perform those duties in a manner that was not antagonistic to her supervisor and co-workers rendered her unqualified for the position. The court noted that although the plaintiff may have had one or more psychiatric disorders, she was fired not because of those disorders but because of her inability to control the expression of her mental illness in the workplace.

Similarly, in *Misek-Falkoff v. IBM Corp.*,[17] the plaintiff was placed on permanent disability status after a series of emotional outbursts, fits of rage and altercations with supervisors and co-workers, as well as erratic attendance. After being placed on disability leave, the plaintiff filed a lawsuit alleging that she was discriminated against because of her mental disability,

but the court rejected her suit. The court assumed that the plaintiff was disabled but held that she was nonetheless unqualified for her job, even though she may have been technically competent. The court observed that it is a requirement of any job that an employee--disabled or not--be able to get along with co-workers and supervisors, and that an employer may require its employees not to cause or contribute to disruptions and hostility in the workplace.[18]

This legal trend carries important implications for employers. It indicates that in addition to technical competence, an employee must be able to handle job stress, deal satisfactorily with customers, accept direction from superiors and avoid antagonizing other employees in order to be deemed qualified for a job under the ADA. Whether an employee's inability to do so is the result of a mental disability is essentially irrelevant.

Job Descriptions

Most court decisions that distinguish between misconduct and disease under the ADA emphasize the employee's inability to satisfy the intangible requirements of a job or to follow the employer's published work rules. Both of these factors, which are largely within an employer's control, can be an effective shield against workers who may portray their interpersonal difficulties as discrimination and harassment.

If an employer has implemented written job descriptions, these will be deemed evidence of the essential functions of the job for ADA purposes.[19] It is crucial, therefore, that job descriptions describe intangible criteria as well as the technical requirements of the job. Job descriptions for all employees should include criteria such as the ability to work with others in a team environment, the ability to accept direction from superiors, the ability to follow work rules and procedures and the ability to accept constructive criticism. Job descriptions for managers and supervisors should contain

an additional requirement that the employee be able to lead and manage others effectively.

Detailed work rules are equally important because an employer still has significant freedom under the ADA to promulgate strict rules of conduct and apply them equally to disabled and non-disabled workers. An employer should promulgate rules against insubordination, threats and violence, discourtesy to customers and co-workers, dishonesty and poor attendance.

There should be a "zero tolerance" policy against sexual and other forms of harassment.[20] Employers should also implement personal appearance and behavior policies prohibiting provocative dress, physical touching and sexual joking and comments in the workplace that may fall short of the legal definition of sexual harassment but which may become the catalyst for claims of harassment.

Further, there should be a strict policy prohibiting substance abuse. Although the ADA covers alcoholics and those with a prior addiction to drugs, it does not protect current users of illegal drugs,[21] those who come to work intoxicated[22] or on drugs,[23] or even off-duty misconduct related to substance abuse, such as drunken driving.[24]

If the employer has set forth the intangible job requirements and published detailed work rules, employees who cannot satisfy them may be disciplined, terminated or placed on medical leave even though a mental disability may be the cause of the misconduct or malfeasance.

Fitness-for-Duty Examination

The ADA also permits an employer to require an employee to undergo a fitness-for-duty examination when there is a question whether a worker is able to perform the essential functions of his or her job.[25] A fitness-for-duty mental examination might be required, for example, when an employee behaves in a violent fashion, suggesting that he or she may pose a danger to him- or herself or others. It may also be required when, because of a mental disability, the employee appears no longer able to perform the essential

functions of the job. A worker may be terminated for refusing to undergo a fitness-for-duty examination.[26]

These examinations are ordinarily conducted by a psychiatrist or clinical psychologist and involve a clinical interview of the worker and possibly standardized psychological testing as well.[27] For the examination to produce a meaningful result, however, the employer must apprise the examiner of the nature of the job, including any written job description, as well as the events that led to the decision to require the examination.

The examiner may conclude that the employee is able to return to work, is unable to return to work or may return to work under certain conditions. These conditions may include that the employee follow a prescribed course of therapy or medication, or that the employer provide a reasonable accommodation.

Accommodation Limits

Although a slight modification or elimination of nonessential job functions may be required as a reasonable accommodation, an employer is not required to eliminate an essential function of a job. For example, the public contact aspect of a job need not be eliminated for an employee who cannot handle the stress of dealing with customers.[28] An employer is not obligated to refrain from directing legitimate criticism to an employee whose mental disorder makes him oversensitive to the slightest criticism or rejection.[29] Nor is an employer required to accommodate violence[30] or misconduct[31] by an employee.

Moreover, an employer is not required to provide a new boss to an employee who cannot get along with his or her current one, even if the employee claims that the current boss has caused his or her mental disorder.[32] Nor is an employer required to create a less stressful job for an employee with a mental disorder; an employer may be obligated to transfer an employee to a new, less stressful position only when a vacancy exists.[33]

Forms of accommodation that might be considered reasonable, depending upon the circumstances, include allowing an employee unpaid time off to obtain therapy or a short-term, unpaid leave of absence to obtain treatment.[34] An indefinite leave of absence is not required because the purpose of an accommodation under the ADA is to assist a disabled person in performing the essential functions of the job rather than protecting disabled people who cannot perform their job duties.

Applicant Screening

The most effective way to avert employee disputes is to avoid hiring "problem" employees. Employers still have considerable freedom under the ADA to screen job applicants carefully and aggressively.

For example, while employers may not administer psychological tests to job applicants that are designed to detect mental disorders,[35] a wide range of questions concerning an applicant's work ethic, attitudes, habits, ability to get along with others and respect for authority are fair game. Pre-employment drug testing is permitted under the ADA,[36] and an employer may refuse to hire an applicant who tests positive for illegal drugs.

Finally, the ADA does not address background checks or reference checks at all. An applicant's prior work history is usually a good indicator of how he or she will perform. Prior supervisors should be questioned about an applicant's attendance, attitudes toward work and supervision and ability to get along with customers and co-workers.

ADA Claims Prevention

Employees who are terminated for legitimate, job-related reasons may later claim retaliation or ADA protection based upon some ADA-covered condition. These claims often allege that the termination resulted from the employer's discovery of an employee's disability.

Employers should thus try to avoid unintentionally learning of an employee's ADA-covered conditions. For example, supervisors should be cautioned against seeking too

much information about employees' personal lives in an attempt to forge a stronger working relationship with the employee. Such inquiries, though well-intentioned, could lead to later claims that the supervisor retaliated against the employee based upon a disability revealed during friendly conversation.

Exit interviews also may be useful toward preventing ADA claims. Workers who resign should be questioned about their reasons for leaving and asked to disclose any unresolved issues with the employer. If the employee reveals a situation involving harassment or discrimination, the employer may try to remedy the situation. If a worker does not raise employer misconduct during the exit interview but later brings an ADA claim, the credibility of such a claim may be weakened.

Although mental disabilities present a challenge in the workplace, an employer can help protect against ADA claims by ensuring that written job descriptions are accurate and comprehensive, that a set of consistently enforced rules are in place, that employment applicants are aggressively screened and thorough exit interviews of departing employees are conducted. These are areas in which time devoted to preventive measures is well spent.

(1) 42 U.S.C. 12101 et seq.

(2) See McDonald, Kulick & Creighton, "Mental Disabilities Under the ADA: A Management Rights Approach," 20 Empl. Rel. L.J. 541 (1995).

(3) 29 C.F.R. 1630.2(h)(2).

(4) See Cong. Rec. S10772 (Sept. 7, 1989).

(5) 29 U.S.C. 12102(2).

(6) EEOC Technical Assistance Manual, reprinted in Fair Emp. Prac. Man. (BNA) at 405:6990.

(7) 29 CFR 1630.2(j)(3)(i).

(8) 101 F.3d 519 (7th Cir. 1996).

(9) See also Muller v. Automobile Club, 5 AD Cases (BNA) 97 (S.D. Calif. 1995).

(10) EEOC Technical Assistance Manual, reprinted in Fair Empl. Prac. Man. (BNA) at 405:6989.

(11) See, e.g., Miller v. National Casualty Co., 61 F.3d 627 (8th Cir. 1995); Johnson v. Boardman Petroleum Inc., 5 AD Cases (BNA) 983 (S.D. Ga. 1996).

(12) EEOC Compliance Manual at Sec. 902.3(b).

(13) Soileau v. Guilford of Maine Inc., 5 AD Cases (BNA) 1036, 1042 (D. Me. 1996).

(14) 849 F. Supp. 777 (N.D. Ala. 1994).

(15) 858 F. Supp. 1572 (N.D. Ga. 1994).

(16) 905 F. Supp. 499 (N.D. Ill. 1995).

(17) 854 F. Supp. 215 (S.D.N.Y. 1994).

(18) See also Boldini v. Postmaster General, 5 AD Cases (BNA) 11 (D.N.H. 1995).

(19) 42 U.S.C. 12111(8).

(20) Sexual harassers are not protected by the ADA, even if their harassment is the product of some mental disorder. See, e.g., Miles v. General Services Admin., 5 AD Cases (BNA) 351 (E.D. Pa. 1995); Winston v. Maine Technical College, 631 A.2d 70 (Me. 1993); Blanton v. AT&T Communications, 1 AD Cases 1552 (D. Mass. 1990).

(21) 42 U.S.C. 12114(a).

(22) Miles v. General Services Admin., supra n.20.

(23) Collings v. Longview Fibre Co., 63 F.3d 828 (9th Cir. 1995).

(24) Maddox v. University of Tenn., 62 F.3d 843 (6th Cir. 1995); Larson v. Koch Refining Co., 920 F. Supp. 1000 (D. Minn. 1996).

(25) See 29 CFR 1630.14(c), Appendix (Interpretive Guidance).

(26) See Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994).